THE MINOR IN JEWISH LAW

By Israel Lebendiger, Holyoke, Mass.

CHAPTER V. THE MINOR ORPHAN

A. The Support of the Minor Daughter after the Father's Death.

Two great reforms took place in post-Biblical times concerning the protection of the female minor orphan. One of them is the support of the minor daughter after the father's death, from the property inherited by the sons. Biblically, the latter are the legal heirs. But the Rabbis made it a point of the marriage contract that the minor daughter be supported from the inherited property, even though the application of this law may result in the consumption of the whole property, and thus render the daughters instead of the sons the real heirs of the father.

In so far as this protection of the minor daughter was made a point of the marriage contract, the support of the minor daughters may be considered as a posthumous duty of the father, and, therefore, it was dealt with more fully in the chapter on 'The Duties of the Father'. But inasmuch as the cause for this reform is the attempt to protect the female minor orphan in her helpless state, this chapter dealing with the 'Minor Orphan' will not be complete if no reference is made to the topic just mentioned.

B. The Marriage of the Minor Daughter, and the Mi'un Institution.

The reform concerning the support of the minor daughter after the father's death did not seem to protect her fully. It seems that circumstances arose which rendered unsafe the innocence and chastity of the minor daughter.[225] This condition gave rise to another great reform, which developed into a regular institution in Jewish life.

Biblically only the father has the power to give his minor daughter in marriage. In order to remedy the evils mentioned in the last paragraph, the Rabbis instituted that the mother or the brothers may secure the protection of a husband for the minor orphan daughter by giving her in marriage.

Of course when we say 'instituted', we do not mean that the Rabbis introduced something new. The giving of the minor daughter in marriage by the mother or the brothers certainly did not originate in an enactment of the Rabbis, but existed as a practice among the people, to which the Rabbis merely gave their sanction. Thus the Rabbis invested the mother and brothers with a power not possessed by them before.

Yet this power of the mother and brothers is different from the same power exercised by the father. The power of the father to give his minor daughter in marriage is his exclusive right, and, therefore, he need not legally consult his daughter when he wants to exercise it. But the law giving the brothers and mother the same power was established primarily for the benefit of the daughter. This law meant, then, to secure a right neither for the mother nor for

[225] Yeb. 112 b; see *ibid.*, Rashi.

the brothers, but for the minor daughter. Consequently, the mother or the brothers can exercise the power of giving the orphan daughter in marriage, only when they obtain her consent.[226]

But while the reform brought protection and happiness to some orphans, it certainly marred the happiness of others, since the females who entered into such marriages were of an age at which they did not have intelligence enough to make a proper choice. To offset this evil, another institution arose, which, not less than the giving of the minor daughter in marriage by the mother and by the brothers, is a reform of post-Biblical times. This institution is spoken of by the Rabbis as Mi'un, meaning refusing or objecting, and consists in the power the minor female orphan possesses of invalidating the marriage contracted for her either by the mother or brothers.[227] Mi'un, as we shall see later, is different from and does not necessitate any bill of divorce. It is simply an objection on her part to live any more with her husband, the procedure of which is performed with very little formalities.

The establishment of this institution appears to involve a disregard of certain Biblical rules. (1) According to the Bible, the separation between wife and husband can be caused only by the will of the latter, and can be effected only by a process in which the latter is the main actor. In the case of Mi'un, the invalidation of the marriage is caused by the will and the action of the wife. (2) The procedure of Mi'un is different from the procedure of divorce. (3) Biblically, the action of a minor in matters which require intention, or intelligence, is invalid. According to one opinion, she cannot even become the passive recipient

[226] *Ibid.*, XIII, 2. [227] Eduyyot VI, 1.

of the bill of divorce to invalidate the marriage contracted for her by her father.[228] And yet the Mi'un must not be considered either a violation of the Biblical law, or a substitution for the bill of divorce. It is the Rabbis who acknowledged the validity of the marriage of the minor daughter after the father's death, and it is they, who, therefore, have the power to provide means for invalidating this marriage.[229]

The marriage of the female minor orphan is valid, if at least she is intelligent enough to take care of the objects presented to her as the instruments of marriage.[230] Otherwise, the marriage is void, and does not necessitate even the process of Mi'un for its invalidation. According to Maimonides,[231] this mental ripeness begins at the age of six.

According to R. Eliezer, the marriage in question binds only to the extent of requiring Mi'un for its invalidation. Otherwise, it does not cause any legal conjugal relationships.[232] The husband, for instance, has no right to the objects that she may find, or to her service. He does not possess the power to annul her vow. He does not inherit her property after her death. R. Joshua maintains the opposite view. According to him, she is considered as his wife in every respect, with the exception that the marriage can be invalidated by a Mi'un.[233] All agree, however, that in case she does invalidate the marriage by Mi'un, the very act of marriage is considered as void, and the relationship between the minor and the person she

[228] See above, ch. IV, section dealing with divorce of the minor.
[229] See Yer. Yeb. XIII, 1.
[230] Yeb. XIII, 2.
[231] Yad, Ishut IV, 6; Gerush II, 7.
[232] Ket. 101 a; Yeb. 108 a.
[233] *Ibid.*

married was not a conjugal one.[234] Therefore, the minor loses her right to the Ketubbah, to support in case she borrowed money to support herself in the absence of the husband, and some other rights.[235] She may also marry afterwards those members of his family whom she would be prohibited to marry, had the Mi'un only the effect of a bill of divorce and vice versa.[236] He may marry her again after she has been married and divorced by another person.[237]

The school of Shammai tries to limit the power of Mi'un. According to this school, it can invalidate only a betrothal, but not a marriage, and can be exercised only against the husband, but not against the Yabam (the brother-in-law who is to perform the Levirate at the death of his brother). The school of Shammai also maintains that the procedure of Mi'un must take place in the presence of the husband and of the court, and that she can exercise it only once.

The attitude of the House of Hillel is more liberal towards the exercise of Mi'un. According to this school, Mi'un can annul a marriage as well as a betrothal; it can be exercised either against the husband or against the Yabam; it does not require the presence either of the husband or of the court; she has also the power of exercising this right more than once.[238]

Yet in practical life, the school of Shammai was not strict in its regulations. It admitted that under certain circumstances its prescriptions can be disregarded. This school, therefore, approved the action of the Rabbis in a certain case, though it was a question of annulling a marriage, and though the Mi'un took place without the

[234] Yeb. 107 b. [235] Ket. XI, 8.
[236] Yeb. 105; Ket. 101 a. [237] Yeb. 108. [238] Yeb. XIII, 1.

presence of the husband. The bad treatment the woman received at the hands of her husband justified the Rabbis in making an exception and declaring the Mi'un valid.[239]

The Rabbis maintained that the school of Hillel excludes the necessity of the presence only of ordained judges, but not the presence of three ordinary judges.[240] It seems, however, that originally only the presence of two was necessary, and these acted more as witnesses than as judges.[241]

There was no special form in which the minor daughter had to express her objection to the marriage. All that she had to say was, 'I refuse to live with my husband; I object to the marriage contracted for me by my mother (or by my brothers)'.[242] Nor was there any special occasion, or special place necessary when she had to make that statement. The court acted on her objection even though she uttered it while she was preparing herself for the

[239] Yeb. 107 b.

[240] Yeb. 107 b. The Tosefta (Yeb. XIII, 1) says expressly that Bet Hillel required the presence of three judges. But it is probable that the words 'unless there are three' is a later addition based on the comment of the Rabbis quoted in the text.

[241] This can be proved by the following: (1) The Talmud (Yer. Sanh. 1, 2) reads בראשונה היו כותבין שטרי מיאונין במעמד פלוני ופלוני מיאנה. It seems that the Talmud takes the words פלוני ופלוני to show that only two were necessary, and, therefore, quotes the Baraita in contradistinction to the Mishnah, which necessitates the presence of three (Sanh. 1, 2). The Babli (Yeb. 107 b, 109 a) quotes a similar Baraita beginning with the word בראשונה, pointing out some other difference between the earlier and the later form of Mi'un. Perhaps the reading of Yer. was the same as that of Babli, only that the second part was lost later. Some scholars still hold that the presence of two is sufficient (Tosef. Yeb. XIII, 2). The Babli maintains, however, that they changed their view (Yeb. 101 b). That the presence of three was not necessary can be inferred from what will follow in the next paragraph in the body of the essay.

[242] Tosefta Yeb. XIII, 2; Yeb. 107 b, 108 a.

marriage, or while she was buying goods in the shop.[243] Sometimes the Mi'un did not consist of an expressed statement, but of an objection implied in her actions. Her marriage to another, for instance, was considered as implying a protest against her first marriage.[244]

The protest was then written up in a document, and signed by those who witnessed it.[245] The contents of the document, or, as it is called, the Get Mi'un, were written up in a definite form, which in course of time underwent several changes. Originally, it read, 'In the presence of . . . . and of . . . . the daughter of . . . . protested against . . . . son of . . . . (and said,) I do not want to associate with him; he is not worthy of it; I do not want to be married to him'. But the fear arose lest some ignorant scribe (on account of the many words the Get Mi'un contained) might mistake it for a regular bill of divorce. The Rabbis, therefore, reducing the number of words, changed the form to the following: 'On the . . . . day, ... daughter of . . . . protested in our presence.' In post-Talmudic times, we find the following form: 'On . . . . (day of the week) the . . . . day of the month . . . . in the year . . . . according to the . . . . era . . . . daughter of . . . . protested before us and said: my mother (or my brothers) deceived me and gave me in marriage (or betrothed me)

[243] This shows clearly that no presence of a court was necessary at the time when she made the objection.

[244] Yeb. 108 a.

[245] It must be kept in mind that the invalidation of the marriage was caused by the expressed or implied objection, but not by the document. The Mi'un document does not at all have the nature of a bill of divorce, and, therefore, is not to be written according to the latter's regulations (Yad. Gerush. XI, 11; Eb. Haez. 155, 7). The Mi'un certificate is given to her merely with the view of providing her with documentary evidence of her Mi'un.

to . . . . son of . . . . and now I declare before you that I do not desire him. We have examined this . . . . and are satisfied that this girl is yet a minor, and have written, and signed, and given (this) to her as a document and [as a clear proof.[246]

So far for the legal aspect of Mi'un. There is also much to be said concerning its moral side. We find authorities as early as the first century C.E. being unfavourably disposed towards the marriage of the minor daughter contracted for her by her mother, or by her brothers, and towards the exercises of the Mi'un institution. We have seen, before, how R. Eliezer tried to minimize the binding power of such marriages. We have also seen how the school of Shammai tried to lessen the cases in which Mi'un should be of any account. In Amoraic literature we meet Rabbah and R. Joseph, who give as the reason for the restrictions set on Mi'un by the school of Shammai, the moral principle that it is objectionable to have the Mi'un render illegitimate one's intercourse with his wife.[247] Bar Kappara counts Mi'un among the things from which a man should keep himself afar.[248]

In the time of the Geonim, Mi'un was greatly discouraged, a fact due largely to the opposition of the Karaites.[249] To prevent the occurrence of the Mi'un, the marriage of the minor daughter was discouraged altogether.[250] In France and in Germany the practice of Mi'un was much in vogue; some of the authorities of these places even protested against those who wanted to

[246] Yad, Gerush. XI, 11.
[247] Yeb. 107.
[248] Yeb. 109 a.
[249] Gan Eden 144 b. See also Löw, *Lebensalter*, pp. 178, 179.
[250] Hag. Maim. Gerush. 11, 3; Tos. Yeb. 109 a.

limit the exercise of Mi'un.[251] Later, however, it met with opposition which reached its climax in the fifteenth century, in the person of R. Menaḥen b. Phinehas of Merseburg, who declared that those who abided by the Mi'un practice have thereby incurred the consequences of the ban. Some authorities defended, and some attacked this attitude of R. Menaḥem.[252] Mi'un was still practised in different communities, and sanctioned by different Rabbis,[253] until the time came when that which could not be abolished by law or authority was eradicated by necessity. More details about the history of Mi'un in post-Talmudic times can be found in Löw, *Die Lebensalter*, 177–84. The age up to which the minor daughter can exercise this right was discussed in a previous chapter. The right of Mi'un exercised by the so-called 'Orphan during her father's life' will be discussed in the next chapter, dealing with the rights of the minor.

C. Guardian and Ward.

A guardian over the minor orphans can be appointed either by the father or by the court.[254] The appointment by the father is valid only when it was made shortly before the latter's death, with the express purpose of having some one to take care of the orphans. But one who has been given the power by the father to superintend his property during his life, does not, on that account, retain the same power after the death of the father.[255] The court can appoint a guardian only when the father failed to do

[251] Or Zarua'l, 686. See also references in previous note.

[252] Yam sheel Shelomoh Yeb. 13, 17.

[253] See Eben ha-Ezer, 155, 22, gloss of Isserles; Pitḥe Teshubah, *ibid.*

[254] Git. 52 a.

[255] Responsa Rash. 62; Hoshen ha-Mishpat 290, 1, gloss of Isserles.

so. Nor can the court exercise this power when the father has expressed his objection to it.[256] The court may, however, in the absence of a guardian, take the place of one, and supervise the estate of the orphans.[257] If one acts on behalf of the orphans, and lives together with them, he has the status of a guardian, though he was not appointed as one.[258]

The Jewish law does not seem to recognize what is called the natural guardian, i.e. one having the status of a guardian by virtue of his kinship with the orphans. As a matter of fact, Jewish law puts limitations on the appointment of a relative as a guardian.[259] The court, however, must not appoint a guardian if the brothers of full age are willing to co-operate as partners with the minors.[260]

The Jewish law does not differentiate consciously between the guardian over the person of the minor (tutor), and the guardian over the estate of the minor (curate). Yet it seems that primarily the guardian was appointed over the estate of the minor,[261] but that, at the same time, he exercised also powers that had to do with the person of the minor.[262]

[256] *Ibid.*

[257] Responsa Rashba 974.

[258] Git. 52a; Piṯḥe Teshubah, Hoshen ha-Mishpat 290, 5.

[259] Hoshen ha-Mishpat 290, 2.

[260] See *ibid.*, Be'er Hag. 2; Tos. Kid. 42a.

[261] This can be inferred plainly from the last law in the last paragraph. If a guardian cannot be appointed primarily over the estate of an orphan, why should then the willingness of the older brothers to co-operate as partners with minors, affect in any way the legitimacy of appointing a guardian?

[262] This is to be inferred from the fact that the guardian is to provide the minor with a Lulab, Zizit, and a Sukkah, a function that certainly relates to the person of the minor.

A guardian can be appointed also merely to perform special functions. He can be appointed as what is known guardian *ad litem*, i.e. the legitimate representative of the orphans in a suit in which they are the defendants. But the representation is given recognition only when the verdict turns out to be in favour of the orphans.[263] According to R. Johanan, if the appointment has been made, and the verdict announced, the decision of the court is valid, even if it is against the interests of the orphans.[264]

Yet the court is obliged to appoint a guardian to take care of a *shor ha-mū'ad* (an ox, the malicious nature of which has been established by his having gored three times), though this action will result in responsibilities in case the ox will gore again;[265] for in this case the evident purpose of the appointment is not to create possibilities for the recovery of damages, but simply to prevent any injury being done by the ox. There is, however, much discussion as to whether we appoint a guardian to take care of a *tam* (an ox that did not gore three times).[266]

[263] Git. 52 a.

[264] Yer. Git. V, 4. The opinion of R. Johanan is not found in Babli.

[265] Yer., *ibid.*; Babli B. K. 39 a.

[266] B. K. 39. The inference of the Talmud from the first part of the Mishnah (*ibid.*) that they do not appoint a guardian to watch a 'tam' is not convincing, for it is possible that the first part does not speak at all of whether we appoint a guardian to take care of a 'tam'. The Mishnah tells us simply that when there is no guardian the minors are not responsible. Tos. (*ibid.*) saw this difficulty and tried to explain it, but the explanation is hardly satisfactory.

The Talmud Babli finds a difference of opinion in the Tosefta (B. K. IV) as to whether we appoint a guardian to watch a 'tam' (B. K. 39 b). Neither is the arguing of the Babli here convincing. It is possible that R. Judah b. Nekusa speaks of a case when there is no guardian altogether, the word לעולם implying that it can never become a 'mu'ad' in the absence of a guardian. But he admits that we appoint one to watch a 'tam'. R. Jose

When the property consists of cash money, no guardian is necessary to be appointed over it. The court deposits it with a person, with whom the chances of gain should be greater than those of loss (Hoshen ha-Mishpaṭ, 290. 8).

The court cannot appoint a guardian either a woman, a slave, a minor, or a man whose honesty may be doubted. They can appoint only one who is upright and skilful, who will know how to act in favour of the orphans, plead their cause, and who has a knowledge of worldly affairs. We cannot, however, remove persons of the former class from the guardianship, if they have been appointed by the father.[267]

A post-Talmudic institution was the writing of an inventory at the time of the appointment, in which an account was entered of all the property that is to be supervised by the guardian, one copy being given to him, and another retained by the court.[268]

in turn deals with the appointment of a guardian, and accordingly gives his view. Thus each one says something different, and they do not differ at all with each other.

Tos. and Rashi (*ibid.*) try to give reasons for the law that we do not appoint a guardian to take care of a 'tam'. Their reasons are not satisfactory. The real reason for it is the law that we do not appoint a guardian when it is against the interests of the minors. It is true that when the animal is a 'mu'ad' we do appoint a guardian, for then the animal is a source of danger to the community, and by appointing one, we try merely to avoid the danger. But there is no danger when the animal is a 'tam', and the appointment of a guardian, therefore, would merely mean the creation of a possibility of holding the orphans responsible, which is against the law. This reason is given in Yer. Git. V, 4. The Yer., however, does not make any distinctions between a 'tam' and a 'mu'ad' in this respect. In giving this reason, we should count as the Yer. (*ibid.*) does, with the difference of opinions, as to whether the guardian or the orphans are to pay for the damages.

[267] Tosef. Ter. 1, 2; B. B. VIII, *ibid.*

[268] Hoshen ha-Mishpat, 290, 3. This does not imply that the guardian

The powers possessed by the guardian are only those, the exercise of which is in favour of the orphans. He may set aside Terumah and tithes from the grain necessary for the domestic use of the minors. He has the power to sell any of their possessions, when the returns are necessary for their support. He has the power to spend funds for their religious training in connexion with things which have a non-continuous expense, as, for instance, buying a palm, buying fringes of a garment, or erecting a tent at the feast of Tabernacles; but not in connexion with things which do have a continuous expense, as, for instance, contributing to charity, and redeeming captives.[269]

He must not sell land in a distant place in order to buy one in a nearer place, nor of a poorer quality in order to buy one of a better quality, as this change may not turn out to be of benefit to the orphans. For the same reason, he must not sell land in order to buy slaves, but he may sell slaves in order to buy land. According to R. Simon b. Gamaliel, he must not effect even what seems to be a change for the better, for there is still the possibility that it may turn out to be injurious to the interests of his charge.[270]

The guardian is not considered the real owner of the property, and, therefore, cannot emancipate any of the slaves. He may, however, effect an emancipation by selling the slaves to another man, who in turn may set them free. Rabbi Judah holds that the guardian can

is to furnish a final account which is to be compared with the first account. As it will be shown later, no final account was necessary. This document was merely used as a reference in case the orphans presented definite claims against the guardians (*ibid.*).

[269] Tosef. Ter. 1, 2; Git. 52 a; Tosef. B. B. VIII, 14.

[270] *Ibid.* and Tosef. B. B. VIII, 15.

emancipate the slave directly, if the latter pays his selling price.[271]

The court has control over the guardian, and it may, therefore, remove him whenever it finds it necessary. It may remove him, for instance, when he is found to waste the orphan's property.[272] It may remove him if at any time during his term of charge he begins to live at an expense higher than that which his means allow him, and thus arouses the suspicion that he uses the estate of the minors.[273] Suspicion, however, is ground for such an action only when the guardian is appointed by the Court, but not when he is appointed by the father.[274]

If, however, the interests of the orphans demand that the social standing of their guardian should be higher, and consequently that he should live up to it, he is allowed to use their estates.[275] Relatives of certain orphans complained before R. Nahman that a guardian dressed himself from the estates of the minors. R. Nahman pacified them by saying that he does it in order that his words may carry weight with the people, and that he shall thus be influential, when he will have to act on behalf of the orphans.[276]

The guardian should not, lest he lose the case, enter into a suit representing the orphans.[277] If, however, he did enter into it, the verdict is valid only if it is in favour

[271] R. Judah considers such a procedure one of transaction, and not one of emancipation. The slave purchases himself, as it were, from the guardian, and then emancipates himself.

[272] Git. 53 b. [273] Git. 52 b.

[274] Hoshen ha-Mishpat, 290, 5; Be'er. Hag., *ibid.* 50.

[275] Git. 52 b. [276] *Ibid.*

[277] *Ibid.* 52 a; Hoshen ha-Mishpat, 290, 12. This is in order not to abuse the other party, which must always lose in the trial with the guardian. See Be'er. Hag., *ibid.* 20.

of the orphans. This, of course, agrees with the general principle that the actions of the guardian are authoritative only when they are in favour of the orphans. For the same reason, the division of the estate among the minors, by the guardian, is not valid if they are not satisfied with their shares after they grow up.[278] R. Nahman holds, however, that the division is valid.

The guardian is not responsible, in case an article has been lost or stolen, since this damage is not due to his negligence, but he is responsible for damages due to his negligence.[279] If, however, he has been appointed merely for the purpose of preventing any damages that may be caused by the property of the orphans, as, for instance, when he has been appointed to take care of a *shor ha-mu'ad*, then the guardian is responsible on the occurrence of such damages, for the simple reason that, otherwise, people will decline the appointment of guardianship for such a purpose.[280] Yet R. Jose b. Hanina holds that even in the latter case the guardian first compensates for the damages from his own estate, and is then reimbursed by the orphans when the latter grow up.[281]

[278] Kid. 42 a. A reason for the view of R. Nahman, and for the fact that the guardian may divide the estate among the minors, in spite of the doubt that the division may be unsatisfactory to the orphans, can be found in Tos. (*ibid.*).

[279] Tos. B. K. 39; Tos. Git. 52 b. [280] *Ibid.*

[281] B. K. 39. The words 'and they are repaid from the orphans when they (the orphans) grow up' in the statement of R. Jose, is a later addition. The Yer. does not have it (Git. V, 4). Nay more, there is even a proof that, according to Yer., the guardian is not reimbursed by the orphans. The Yer. makes the view of R. Jose correspond with the opinion that we appoint a guardian over a 'shor mu'ad', declaring that since the guardian is to make good for the damages, such an appointment is not against the principle that we do not appoint a guardian when it is against the interests

When the orphans grow up, the guardian returns to them their funds, and gives them, according to R. Judah, an account of his management. R. Simon b. Gamaliel holds that he is relieved from giving an account.[282] According to one opinion, a guardian appointed by the father does not take an oath at the return of the estate, that he did not appropriate for himself any of the possessions of his charge, for the duty to take such an oath may discourage people from undertaking the responsibilities of guardianship. But, when the guardian is appointed by the court, this discouraging element is counterbalanced by the pleasant feeling one has at the fact that the court has confidence in him, and, therefore, there is no objection to administering him an oath. The majority of scholars hold the opposite view. According to them, since the guardian receives no compensation for his service, this harmful result is to be more feared when he is appointed by the court. But the father usually appoints one upon whom he has conferred favours, and, therefore, the latter will not, on the ground of the oath, refuse to please the father by accepting an appointment.[283]

This difference of opinion has to do only with an oath not called forth by a definite claim of the orphans. If, however, the orphans claim that the guardian has not been honest in his charge, all agree that we administer to him an oath in every case.[284]

There is also a difference of opinion among post-Talmudic scholars as to whether the one who assumed

of the orphans. But this reasoning has no basis if the orphans are finally to suffer for it.

[282] Git. 52a; Tosef. Ter. 1, 2; B. B. VIII, 15. [283] *Ibid.*

[284] Hoshen ha-Mishpat 290, 16.

to act as guardian, without being appointed as one, is bound to take an oath in the absence of a definite claim.[285]

The guardian is to be compensated if he supported the orphans from his estate. If, however, he expressed himself to the effect that he did it as charity, he loses all claims of compensation.[286]

D. Attachment on the Estate of Minor Orphans.

An attachment will not be issued on the estate of minor orphans to pay the father's debts, except in the cases given later.[287] R. Papa accounts for this law by the fact that the payment of a debt is a virtuous act, and virtuous acts are not obligatory upon orphans.[288] This reason is almost unanimously ignored.[289] R. Nahman who, according to R. Papa, acted on the former principle, afterwards changed his mind, and said: 'The orphans who support themselves from that which does not belong to them, should follow the path of their deceased father (i.e. should meet death).'[290]

[285] Tur. Hosh. ha-Mishpat 290, B. [286] Hosh. ha-Mishpat 290, 25.

[287] Arakin 22 a; Yer. Ket. IX, 7; Git. V, 2.

[288] Arakin 22 a; B. B. 174; see *ibid.*, Rashbam.

[289] Evidently R. Papa takes the statement פריעת ב"ח מצוה to mean that to pay a debt is only a virtuous act. As a matter of fact, it means that to pay a debt is also a virtuous act, besides being one in which a legal duty is fulfilled. Now, if this legal duty is transmitted to the children, there is no reason why they should be exempt from its fulfilment, though it is not obligatory on them as a virtue.

[290] Arakin 22 a. It seems from the Talmud that as a result R. Nahman began to issue attachments. It is difficult to see how he could act thus against the general principle that attachments are not issued on the estate of minor orphans. It is still more surprising that the Talmud makes no remark about it.

The reason given by R. Huna for the rule is the fear lest the father paid the debt to his creditor, and insufficient time elapsed before the former's death to have the bill withdrawn from the latter.[291] Raba goes further and says that there is the possibility that the father possessed a receipt for the payment of his debt, which the orphans cannot find.

If, therefore, there is evidence that the debt has not yet been paid, the court will issue an attachment.[292] This is

[291] Arakin 22 a; B. B. 174.

[292] *Ibid.* According to R. Papa, we see the reason why the Court does not issue an attachment on the estate of the minor, and issues on the estate of the orphan of full age. Virtuous acts are obligatory on the latter, and not on the former. But the reasons given by Raba and Huna should hold good even with regard to the estate of orphans of full age. All commentators and codifiers unanimously take the discussion in Arakin 22, which is the main source of this law, to deal with an estate of a minor orphan (see Tos. and Rashbam, B. B. 147 a; Tos. and Rashi, Arakin 22 a; Tos. Ket. 86, 87; Hoshen ha-Mishpat 108, 3; 110). This, however, is not evident from the text itself. It is also hard to understand why the Talmud does not remove the difficulties raised against the view of R. Asi from the passages beginning with שום היתומים, with אין נפרעין, and with ע"מ ליתן, by saying that these passages deal with the issuing of an attachment on the estate of orphans of full age. Tos. in Ket. hints at this difficulty. But the explanation of Tos. is not satisfactory. In the first place, it is contrary to the view in the Talmud (Git. 50) which assumes that the statement beginning with the words אין נפרעין refers also to the estate of orphans of full age. And in the second place, the explanation of Tos. does not suffice as an answer to the question, why does not the Talmud take the passages beginning with שום היתומים and with ע"מ ליתן to deal with orphans of full age?

With regard to the reason of Raba, we may concede and say that when they shall have grown up the orphans will be more skilful in finding the receipt of their father. But it is hard to see how, according to R. Huna, the ripe age of the orphans affects our suspicion of the father having paid his debts before he died.

We should also note that an attachment for a loan not entered in a document, or for a loan entered in a document which has not been verified, cannot be issued even on the estate of orphans of full age (Hoshen ha-

true in case the father acknowledged the debt before his death,[293] or in case the loan was made for a certain period of time, and the father died before the period expired. In the latter case, it is assumed that a man does not pay his debt before the time is due.[294]

The court also issues an attachment in case the court excommunicated the father, while he was alive, for not paying the debt. Any suspicion that the father may have paid is removed in this case by the fact that had he done so, he would have done it through the court, in order to remove its ban.[295]

In these three cases, an attachment is issued even for a loan not entered in a document.[296] But in the case where the loan was made for a definite period, the attachment lies only, if the witnesses who verify this condition gave their testimony before the father died. The law does not accept the testimony of witnesses in the absence of the second party, or in case the testimony is against persons who do not possess legal capacity. Since the minor does not possess legal capacity, testimony against him cannot be accepted.[297]

Under urgent circumstances, an attachment is issued, even when there is no evidence that the debt has not been paid. Such is the case when a speedy payment of the

Mishpat 108, 1; B. 175). The only difference, then, between orphans of full age and minor orphans with regard to issuing an attachment will be in reference to a loan entered in a document which has been verified (Hoshen ha-Mishpat 108, 3). But it does not seem probable that such a sweeping statement as אין נזקקין לנכסי יתומין אלא א"כ רבית אוכלת בהן should merely have in view the elimination of an attachment on the estate of minor orphans with regard to this one kind of loans.

[293] Arakin 22; B. B. 174.

[294] B. B.

[295] Arakin 22; see *ibid.*, Rashi.

[296] Hoshen ha-Mishpat 108, 3.

[297] Tos. B. B. 5 b.

debt will prevent the orphans from suffering any losses. Therefore, an attachment is issued when the debt bears interest.[298] As a Hebrew is not allowed to take interest from another, such a case can, therefore, only happen when the loan was made from a Gentile who has voluntarily submitted himself to Jewish jurisdiction in everything except with regard to taking interest.[299] R. Johanan holds the view that an attachment is issued for the Ketubbah of the widow, because the orphans are thereby benefited in that they do not have to support her.[300]

An attachment also lies, in case the father said before his death: 'Give a hundred *zuzim* (a kind of coin) or a field to so and so.' A guardian is appointed in this case to see that the selection is not made from the better portions of the field.[301] Yet if the orphans have acquired property illegitimately, it is restored to the real owner, and no appointment of a guardian to represent the orphans in the trial is necessary. In such a case, the court itself acts on the testimony of the witnesses.[302] If, however, the orphans base their claims on the fact that it was occupied unchallenged by their father, the court postpones the trial until they grow up.[303]

An attachment is issued for a loan which either the guardian or the court incurs for the subsistence of the orphans.[304] The reasons against the issuing of an attach-

[298] Arakin 22; Hoshen ha-Mishpat 110, 1. [299] *Ibid.*

[300] *Ibid.*, Yer. Ket. IX, 7; Git. V, 2. [301] Arakin 22 b.

[302] *Ibid.* Yet, according to Maim., even in this case a guardian is appointed (Yad, Malweh we-Loweh XII, 5).

[303] B. K. 112 b; Maim., Malweh we-Loweh 12, 3; gloss of Isserles. See also *ibid.*, Be'er. Hag. 80.

[304] This is the opinion of Maim. and the Rash. There are, however, authorities who differ with them (see Rash. Ket. 100; Hoshen ha-Mish.

ment for a loan made to the father do not hold good when the loan is made for the benefit of the orphans. Even R. Papa agrees with this view, for virtuous acts are binding on both the court and the guardian.[305]

The Mishnah has the statement that payments are to be made only from the worst portions of the fields inherited by the orphans.[306] In the Babylonian Talmud the question is raised, whether this law applies also to the estate of orphans of full age, and the decision is given in the affirmative.[307] The Palestinian Talmud says expressly that it applies only to the estate of minor orphans.[308]

E. Advantages in Purchase.

The general protection which the Jewish law extends to minor orphans reveals itself also in some advantages which the latter enjoy in matters of purchase. Secular purchases are made by means of *meshikah* (pulling or moving the article).[309] Goods bought for or from the Temple change ownership by the payment of money when that is to the advantage of the Temple. Now, then, the Jewish law declares that the estate of the minor orphans has the status of the estate of the Temple with regard to purchase, if it is for their advantage that the sale be transacted by the payment of money. If, however, the interests of the orphans demand that a purchase made by means of pulling be valid, the estate of the orphans has then the status

110, 8). The objections of the latter against this law have certainly some basis, which needs consideration.

[305] Consideration may be given to the question whether, according to R. Jose b. Hamina (B. K. 39a), the payment is to be made from the estate of the guardian or of the orphans (Rash., *ibid.*).

[306] Git. 48 a. [307] Git. 50. [308] Yer. Ket. IV, 7; Git. IV, 2.

[309] Kid. 28 b.

of a secular estate, and the transaction is accordingly unretractable. The one, therefore, who bought an article from the orphan, the price of which increased after he committed the act of pulling, cannot retract the transaction.[310]

F. Debts to Orphans and the Sabbatical Year.

According to Jewish law, debts are forfeited during the Sabbatical year. Hillel secured the debts for the creditor by his enactment of the 'Prosbol' (a document which the creditor submits to the court, and is signed by the latter), by which the debt is transferred to, and reclaimed by the court from the debtor.[311]

No submission of a 'Prosbol,' is necessary for loans owed to minor orphans. The court gains power of action against the debtor by the fact that it stands in a parental relation to the orphans.[312]

CHAPTER VI. POWERS AND RIGHTS OF THE MINOR

A. Transactional and Contractual Powers.

The underlying principle of the attitude of the Rabbis with regard to the problem of the powers of the minor is a purely psychological one, and is couched by them in the few words יש לו מעשה ואין לו מחשבה 'he has (capacity of) physical action, but not of intention'.[313] Only such actions of his are valid which require pure physical

[310] Kid. 29 a.
[311] Git. 52 a.
[312] Git. 37 a; B. K. 37 a.
[313] Makshirin VI, 1; III, 8.

capacity, but not those which require mental capacity. This point of view of the Rabbis will help us to explain many points, and attention will be called to it wherever necessary.

A minor under the age of six, or according to one opinion under seven, and under nine according to a third opinion, has no contractual powers whatever. Above the age of six, seven, or nine, according to the respective opinions, he can sell or buy movables but not immovables.[314] Real estate or immovables he cannot sell before he is eighteen according to R. Nahman, and before he is twenty according to R. Huna.[315] If, however, one shows exceptional cleverness, and is very skilful in matters of purchase, Raba maintains that his sale of real estate is valid, even though he is not twenty.[316]

It is morally wrong to take away an article that is found by the minor. R. Jose says that it is legally wrong.[317]

The minor cannot, because of lack of contractual powers, emancipate the slaves he inherited from the father. If the emancipation of a slave is desirable, then a guardian is to be appointed for that purpose.[318]

For the same reason the minor cannot set aside Terumah.[319] Rabbi Judah, however, maintains that his

[314] Git. V, 7; Gem., *ibid.* 59 a. This is a later Rabbinical enactment, and is due, as the Talmud properly remarks (*ibid.*), to the attempt of the Rabbis to procure for the minor a medium by which he could buy his daily necessities.

[315] B. B. 155 a. The attainment of an old age for the power to sell immovables is required as a check to hasty and imprudent sales. One is to be more scrupulous in selling immovables than movables, as the former cannot easily be acquired.

[316] B. B. 155 b; see *ibid.* Rashbam.

[317] Git. V, 8.

[318] Git. 40; Löw, *Die Lebensalter*, 150-55 a.

[319] Terumot II, 1.

setting aside the Terumah is binding.[320] R. Jose says that he can set aside Terumah the moment he reaches the age when his vows begin to be valid (twelve and one day for a boy, and eleven and one day for a girl).[321] Nor can the minor set aside tithes.[322]

According to R. Asi, the moment the minor is able to distinguish between a nut and a splinter, he can acquire ownership of an object by his own act for himself, but not for others. But when he has already intelligence enough to return, upon request, an object that is given to him, he can acquire ownership also for others. Samuel holds that in both cases he cannot acquire ownership for others.[323] The Tosafot distinguish between when there is one who gives possession to the minor and between when such a factor is absent. In the former case, the minor possesses the power of acquisition by virtue of a Biblical statute, while in the latter case he possesses this power by virtue only of a Rabbinical enactment.[324]

According to Jewish law, slaves of a person who has no heirs—as a proselyte, for instance, who died childless—are emancipated after the death of their master, for they take possession of themselves. But minors who do not have the power to acquire ownership of objects in the absence of a person who gives possession, are not emancipated by the death of their master.[325]

[320] Terumot I, 13. [321] *Ibid.*

[322] Ma'aser Sheni IV, 4; Git. 65. See *ibid.* Tos. The question of Tos. is sound. Its answer is not satisfactory. Nor can we accept conscientiously the Talmudic assertion (*ibid.*) that the Mishnah of Ma'aser Sheni IV, 4 speaks of tithes, the duty to set aside which is only Rabbinical.

[323] Git. 64 b. See *ibid.* Tos. [324] *Ibid.*

[325] Git. 39 a. See Tos. *ibid.*

B. Power to Contract a Marriage.

In the last section we have seen that the minor does not possess contractual powers, because acts of acquisition require a mental maturity, which the minor does not possess. For the same reason the marriage of a minor is invalid. It is not binding even Rabbinically. The Rabbinic enactment concerning the marriage of a female minor orphan, discussed in another chapter, does not extend to the marriage of a male minor orphan.[326] Some authorities even prohibit any one from inducing a male minor to contract a marriage.[327]

The marriage of a female minor orphan has been discussed in another place. There is, however, a possibility for a female minor to have the same status of the female minor orphan, though her father is alive; and that is, when the husband to whom her father has given her in marriage either died or divorced her. She is not now, as was shown in another place, any longer under the control of her father. Any marriage contracted by her, from now on, is Rabbinically valid to the extent that a Mi'un is required for its invalidation.

A female minor can, according to some authorities, receive her bill of divorce to invalidate the marriage contracted for her by the father.[328] But she cannot appoint an agent for that purpose, for a minor does not have the power to appoint agents.[329]

[326] Eben ha-Ezer 43, 1.
[327] *Ibid.*
[328] Git. 65 b.; see Tos., *ibid.*
[329] Git. 65 a.

C. Capacity of the Minor to perform acts which require mere physical matureness.

The minor has the power to perform acts which require mere physical matureness, or physical capacity. We may eat from the animal he slaughters, if there was a person of full age present, who saw that the act of slaughtering[330] was in accordance with Jewish law. The minor is also allowed to do the writing of a bill of divorce.

D. Capacity of being counted in a Quorum.

A minor cannot be counted in a quorum of three in saying grace after a meal.[331] Rabbi Joshua b. Levi maintains that he can be counted in a quorum of ten.[332] According to Rabbi Joḥanan, the minor is qualified to be counted in a quorum[333] the moment he begins to develop puberal signs.

The question of the qualification of the minor to be counted in a quorum has been the basis for many controversies in post-Talmudic times. To small Jewish communities this was an important question. Mediaeval authorities differ on this point. Some object to counting a minor even in a quorum of ten. R. Tam maintains the opposite. In some localities there grew up the custom, in the middle ages, to count the minor in a quorum while he held a Pentateuch in his hand. R. Tam ridiculed this power attached to the holding of the Pentateuch.[334] For

[330] Git. 11, 22.

[331] Ber. 47 b.

[332] *Ibid.* According to Tos. (*ibid.* 48 a) R. Joshiah refers to a quorum for both prayer and grace.

[333] *Ibid.* It is doubtful whether he refers to a quorum of three or of ten (see *ibid.* Tos.).

[334] Tos. Ber. 48 a.

more information concerning the history of this question in post-Talmudic times consult Löw, *Die Lebensalter*, p. 207, &c.

E. Capacity to act as the Reader of Prayers.

There is a post-Talmudic view which maintains that a minor can act as the reader of grace after a meal.[335] (By acting as a reader, is meant, that the minor relieves other people from the duty of reciting it if they listen to him.) Both the Babylonian and the Palestinian Talmud are against it, for the duty of the minor to read grace is only Rabbinical, and he cannot, therefore, relieve persons of full age from the duty of reading grace, which is Biblical.[336]

According to one opinion, the minor cannot act as the reader of the Megillah.[337] Rabbi Judah grants this right to the minor.[338] R. Judah supports his view by the fact that he himself read the Megillah, when he was a minor, in the presence of R. Tarfon and the elders.[339] The minor can act as the reader of Hallel, if the persons repeat in turn what he recites. Yet the Rabbis were not satisfied

[335] Tos. Ber. V, 18.

[336] The Talmud Babli, in its attempt to reconcile its view with that of the Tosef., says that the latter speaks of relieving persons of full age only from a Rabbinical duty. But it does not seem so from the Tosef. The words באמת אמרו which open the passage show that the latter is given in opposition to another view, and this is only possible when the Tosef. speaks of relieving persons of full age from a Biblical duty. The Yer. has a different explanation of the Tosef. (Yer. Ber. III, 3). But its explanation is not satisfactory either.

[337] Meg. II, 3. [338] *Ibid.*

[339] It is doubtful whether R. Judah would grant this right to the minor in connexion with reading prayers. The duty of reading the Meg. is, after all, only Rabbinical. Tos. Meg. 11, 7.

that the minor should act as a reader, and therefore said: 'A curse should rest on those (who appoint the minor as a reader)'.[340] The minor can be counted among the seven persons that are called on Sabbath to read the Biblical portion of the week, and is allowed to read his portion.[341]

F. Liabilities of the Minor.

In Jewish law, one's intention is the basis for holding one responsible for crimes and injuries. The minor, therefore, who, as was shown in the beginning of this chapter, does not have the status of a person of full age in acts which require thought and intention, he is not held responsible for crimes. A minor is not guilty, when he injures a person of full age.[342] But a person of full age is guilty when he injures a minor. A minor is not guilty of manslaughter if he kills a person of full age, but a person of full age is guilty of manslaughter if he kills a minor.

G. Legal Capacity.

A minor does not possess legal capacity, and cannot, therefore, form the second party at a trial. If people have claims against him, they have to wait until he becomes of full age. The question as to the appointment of a guardian in such cases, or as to the powers of the guardian to represent the minors in trials, was discussed in another chapter.

H. Qualification to act as a Witness.

The testimony of a minor is not accepted before he reaches his thirteenth year and one day, and before he

[340] Suk. III, 10. [341] Tosef. Meg. III. [342] B. K. VIII, 4.

shows the presence of puberal symptoms. After he has fulfilled these conditions, he is only qualified to give testimony in connexion with movables.[343] Unless he is exceptionally clever in matters of purchase, his testimony is not accepted in connexion with immovables before twenty.

Nor is the testimony of a person of full age accepted when it has reference to things which he saw when he was a minor. When, however, no real testimony is required, but mere information about a certain matter, the testimony of such a nature is accepted.[344] Such a testimony is also accepted in matters which have only a Rabbinical status.[345]

I. Conclusion.

The data in the last five chapters indicate the important place the minor has occupied in Jewish law, and the attention that was paid to the minutest detail with regard to his rights and powers. In connexion with the attainment of majority we remarked that Jewish law with regard to age shaped itself on natural and psychological principles. This is true of Jewish law with regard to many other phases of life. To convince ourselves of this truth, we have only to recall what we pointed out before, that the underlying principle of the Rabbis in determining the rights and powers of the minor, was the statement: 'He (the minor) has (capacity of) physical action, but not of intention.' This conception of the legal status of the minor was pointed out to be a purely psychological one, and not the result of theoretical speculation. Lastly, as can readily be seen from the history of the Mi'un institution, and the provision

[343] B. B. 155; Hoshen ha-Mishpat 35, 1–3

[344] Ket. 28; Hoshen ha-Mishpat 35, 4–6.

[345] *Ibid.*

of supporting the minor daughter, Jewish law adapted itself to circumstances, giving expression to new institutions called forth by new conditions. Furthermore, this adaptation to circumstances necessitated sometimes the use of certain schemes and artificialities, by means of which, though no Biblical law was violated, yet results were obtained which were in direct opposition to those that would have been obtained by the application of the Biblical law. This again proves what we maintained before, that Jewish law with regard to a minor was not the result of abstract thinking, but the embodiment of a response to the practical demands of practical life.